Court of Queen's Bench of Alberta

Citation: Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission, 2018 ABQB 476

Date: 20180619
Docket: 1501 15056, 1601 13790, 1601 13768
Registry: Calgary

Action no. 1501 15056

Between:

Steam Whistle Brewing Inc.

Applicant

- and -

Alberta Gaming and Liquor Commission

Respondent

Action no. 1601 13790

And between:

Steam Whistle Brewing Inc.

Applicant

- and -

Her Majesty the Queen in Right of Alberta as represented by the Alberta Gaming and Liquor Commission

Respondent

Action no. 1601 13768

And between:

Great Western Brewing Company Ltd.

Applicant

- and -

Her Majesty the Queen in Right of Alberta as represented by the Alberta Gaming and Liquor Commission

Respondent

Reasons for Judgment
of the
Honourable Madam Justice Gillian D. Marriott

I. Overview

[1] The liquor market in Alberta is privatized. However, before any liquor makes its way to retailers, it first passes through the Alberta Gaming and Liquor Commission (the "AGLC"), a corporation established under the *Gaming and Liquor Act*, RSA 2000, c G-1 ("*GLA*"). The AGLC collects a mark-up on the liquor it then sells to private retailers. Notionally, this mark-up is paid by the retailers, but in reality it is absorbed by the producers.

[2] The AGLC applies different mark-up rates to different classes of liquor. Historically, it has applied higher rates to beer produced by large, multi-national corporations than to beer produced by small, domestic "craft" brewers.

[3] Prior to October 28, 2015, the lower mark-up rate applied to all craft beer produced anywhere in Canada. On that date, a new mark-up regime (the "2015 Mark-up") came into effect, giving favourable treatment to craft beer produced in British Columbia, Alberta and Saskatchewan. Shortly thereafter, Steam Whistle Brewing Inc., an Ontario craft brewer, commenced an action against the AGLC, claiming that the regime was unconstitutional.

[4] On August 5, 2016, the mark-up regime was again altered. Under the new regime (the "2016 Mark-up"), all brewers were charged the same rate. However, the Province of Alberta simultaneously created a program which provided Alberta craft brewers with a grant identical to the difference they paid under the 2015 and 2016 Mark-ups. Great Western Brewing Company Ltd., a Saskatchewan craft brewer, then sued the AGLC.

[5] Though the 2015 Mark-up and the 2016 Mark-up are distinct, much of the following analysis is applicable to both of them. For ease of reference I will refer to them collectively as the "Mark-up" except to the extent that it is necessary to identify them separately.

[6] Steam Whistle and Great Western argue that the Mark-up is a tax that violates s. 53 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (the "*Constitution*"). They also argue that the Mark-up constitutes a barrier to interprovincial trade that violate s. 121 of the *Constitution.* They seek declaratory relief and restitution of amounts paid under the Mark-up.

II. Section 53

[7] Section 53 of the *Constitution* provides:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

[8] As the Supreme Court of Canada stated in ***620 Connaught Ltd v Canada (Attorney General)***, 2008 SCC 7 at para 4, s. 53 ensures that "…the Crown may not levy a tax except with the authority of Parliament or the legislature." The Supreme Court in that case went on to quote from its judgment in ***Re Eurig Estate,*** [1998] 2 SCR 565 at paras 30 and 32, explaining the rationale underlying s. 53:

> The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. …
>
> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. …

[9] It is common ground that s. 53 applies to provincial legislatures as well as to Parliament by virtue of s. 90 of the *Constitution*.

A. The *Lawson* Factors

[10] It is clear from the case law, including ***Connaught*** and ***Eurig***, that not every government levy constitutes a tax. The Supreme Court of Canada in ***Lawson v British Columbia (Interior Tree Fruit & Vegetable Committee of Direction)***, [1931] SCR 357 described the characteristics of a tax as being:

> (1) enforceable by law;
>
> (2) imposed under the authority of the legislature;
>
> (3) levied by a public body; and
>
> (4) intended for a public purpose.

[11] As Rothstein J pointed out in ***Connaught*** at para 23, "These characteristics will likely apply to most government levies. The question is whether these are the dominant characteristics

of the levy or whether they are only incidental." This was aptly expressed by the British Columbia Supreme Court in ***MacMillan Bloedel Ltd v British Columbia*** (1985), 69 BCLR 11 (SC) at para 7:

> With great respect, although [***Lawson***] is authority for the proposition that an impost cannot be a tax unless it meets those criteria, I do not think the converse necessarily follows, that anything meeting those four criteria must be a tax. …those four tests would apply to a ferry fare in British Columbia, although in my opinion that fare is not a tax but a fee for service imposed under statutory authority.

[12] The parties devoted little argument to the ***Lawson*** criteria. Both Steam Whistle and Great Western asserted, rather baldly, that the Mark-up has all the attributes of a tax, though Steam Whistle added the caveat: "save for failing to be imposed by the legislature". This seems paradoxical, as it results in Steam Whistle arguing that the Mark-up does not meet the ***Lawson*** criteria for a tax yet is a tax, albeit not constitutionally valid. The AGLC made no reference to the criteria in its brief.

[13] Notwithstanding the lack of extensive argument by the parties, it is useful to review the criteria. I find, first, that the Mark-up is enforceable by law. Section 50 of the *GLA* provides that "No person may, except in accordance with this Act or in accordance with a liquor license, manufacture, import, purchase, sell, transport, give, possess, store, use or consume liquor." Section 77 provides as follows:

> 77 No person may import liquor into Alberta unless
>
> (a) the liquor has been purchased by or on behalf of the Commission and the liquor is consigned to the Commission,
>
> (b) the person is a manufacturer and the board has authorized the manufacturer to import the liquor for the purposes of blending with and flavouring liquor made by the manufacturer, or
>
> (c) the importation is authorized by this Act or a federal Act.

[14] Section 80 of the *GLA* permits the AGLC to impose a mark-up, which it defines as "the profit generated by the Commission on the sale of liquor."

[15] Clearly, then, the Mark-up is enforceable by law. Parties wishing to import liquor into Alberta must do so through the AGLC, which is entitled to charge a mark-up. The AGLC argues that the Mark-up is not compulsory, but arises through the voluntary pursuit of commercial activity. In my view, compulsion is not an element of this first ***Lawson*** factor and properly should be considered in respect of whether the Mark-up is a proprietary charge. I note that this was the approach taken in ***Toronto Distillery Company Ltd v Ontario (Alcohol and Gaming Commission)***, 2016 ONSC 2202, aff'd 2016 ONCA 960. The application judge found that the mark-up in that case met the ***Lawson*** criteria, then went on to consider compulsion. I will follow that approach, deferring the AGLC's compulsion argument until later in these Reasons.

[16] The second ***Lawson*** factor requires that the levy be "imposed under the authority of the legislature." As noted above, Steam Whistle asserts that the Mark-up was not imposed by the legislature. This, in my view, reflects a misunderstanding of the factor. For purposes of the ***Lawson*** factors, a levy need not be imposed directly by the legislature, but only "under the authority" thereof.

[17] The cases make clear that a levy arising under statute will meet the second criterion. For example, the Court in ***Re St Francis Xavier University*** (1999), 7 MPLR (3d) 165 (NSSC) held at para 20:

> The charge in question is one which is imposed under the authority of the legislature. Section 172 of the *Municipal Government Act* authorizes Town Council to make by-laws respecting services provided by or on behalf of the municipality. More on point is s. 325(f) of the *Municipal Government Act* which authorizes Town Council to make by-laws regarding "the amount and manner of payment of any fees and charges to be paid for the deposit of solid waste at a solid waste management facility. There is no doubt that the charge referred to in the By-law is one which is imposed under the authority of the Legislature.

[18] Similarly, in ***Canadian Assn of Broadcasters v Canada***, 2008 FCA 157 at para 27, the Federal Court of Appeal accepted the finding of the Court below that "Since the Part II fees are imposed and collected in accordance with the Regulations purportedly made pursuant to section 11 of the Act, those fees were held to be imposed under the authority of the legislature."

[19] Accordingly, as the Mark-up arises under the terms of the *GLA*, I find that it meets the second ***Lawson*** criterion.

[20] The third ***Lawson*** factor requires that the charge in question be levied by a public body. There can be no serious dispute that the AGLC is a public body.

[21] Finally, ***Lawson*** requires that the levy be "intended for a public purpose". In ***Toronto Distillery***, the application judge held at para 24 that the mark-up in question had a dual public purpose: revenue generation and curbing excessive alcohol consumption. In this case, the *GLA* provides in s.3 that the objects of the AGLC include "to control in accordance with this Act the manufacture, import, sale, purchase, possession, storage, transportation, use and consumption of liquor" and "to generate revenue for the Government of Alberta". I note that Jody Korchinski, Vice President of Liquor Services for the AGLC, stated in her affidavit that revenue from liquor is used, *inter alia*, to fund various facilities and programs associated with the social cost of alcohol, including hospitals and addiction services. I am satisfied that these are public purposes as contemplated by ***Lawson*** and, therefore, that the fourth requirement is met.

[22] Taking all of the foregoing into account, I conclude that the Mark-up meets all of the ***Lawson*** criteria for a tax. Consequently, I must determine whether, in pith and substance, the Mark-up actually is a tax or is something else.

[23] The Supreme Court said in ***Connaught*** at para 16 "The pith and substance of a levy is its dominant or most important characteristic … to be distinguished from its incidental features." The Court went on in the next paragraph to quote as follows from its decision in ***Westbank First***

Nation v British Columbia Hydro & Power Authority, [1999] 3 SCR 134, enumerating the possible categories of government levies:

> In all cases, a court should identify the primary aspect of the impugned levy… Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

[24] I note that in these proceedings, the parties referred to the third category as a proprietary charge, rather than as a user fee. I will discuss this discrepancy in terminology later in these Reasons.

B. Regulatory Charge

[25] The case law is clear that when a levy satisfies the four ***Lawson*** criteria, the next step is to determine whether it is a regulatory charge rather than a tax. In ***Westbank***, the Supreme Court held that the determination of whether a levy constitutes a regulatory charge is a two-step process. The first step is to identify whether there is a regulatory scheme. If there is, the second step is to ascertain whether the revenue generated by the levy is tied to that regulatory scheme.

[26] With respect to the first step, the Court held at para 44:

> [A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behavior; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

[27] The Court in ***Connaught*** held at para 25 that the first three criteria establish the existence of a regulatory scheme, while the fourth establishes that the regulatory scheme is relevant to the person being regulated. However, the Court cautioned in both ***Westbank*** and ***Connaught*** that this list of factors is not to be taken as if prescribed by statute. The list is not exhaustive. Neither must every factor be present to establish a regulatory scheme.

[28] The AGLC made no mention in its briefs of the regulatory charge argument. It was argued by both Steam Whistle and Great Western and therefore I will consider it.

[29] Great Western states in its brief that there is "no dispute that the [*GLA*] creates a regulatory scheme governing the manufacture, import and sale of liquor." Steam Whistle asserts that there is "some question" as to whether there is a detailed code of regulation, but does not press the point.

[30] I find, first, that the *GLA* creates a "complete, complex and detailed code of regulation." The statute comprises an extensive set of provisions governing liquor supply, importation, sale, marketing, transportation, consumption and use.

[31] Turning to the second factor, I find that the purpose of the scheme set forth in the *GLA* is to influence the behavior of persons who, in the words of s. 50, "manufacture, import, purchase, sell, transport, give, possess, store, use or consume" liquor.

[32] Third, there is no dispute that there are actual costs of the scheme created by the *GLA*.

[33] With respect to the fourth factor, the government of this province, like those in other provinces, has made a policy decision to regulate the supply and consumption of alcohol. The AGLC notes in its brief that "The consumption of alcohol creates social costs and imposes financial burdens on government." The relationship between the regulatory scheme and the party being regulated in this case is clear because implementing that policy decision necessarily requires regulating the suppliers of alcohol.

[34] As I have found that these factors have been satisfied, it is clear from ***Connaught*** that the existence of a regulatory scheme has been established. Therefore, I must move to the second step, which is to determine if there is a relationship between that scheme and the levy in question. The Court in ***Westbank*** held at para 44 that "This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behavior." Similarly, the Supreme Court said this in ***Connaught*** at para 20:

> …regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behavior. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behavior, e.g. "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles"…

[35] The Court in ***Connaught*** pointed out that this requirement is not inflexible, stating at para 40 that:

> …the government needs to be given some reasonable leeway with respect to the limit on fee revenue generation. While a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge and would be a strong indication that the levy was in pith and substance a tax, a small or sporadic surplus would not, as long as there was a reasonable attempt to match the revenues from the fees with the cost associated with the regulatory scheme.

[36] It is undisputed that the revenue generated by the Mark-up is greatly in excess of the costs of administering the regulatory scheme under the *GLA*. The figures provided by the parties

differ very slightly, but it is common ground that in 2015-16, the Mark-up generated over $800 million in revenue, while the AGLC's operating expenses were approximately $34 million. This is, as ***Connaught*** states, an indication that the Mark-up is not a regulatory charge. There is, however, another possibility that was not addressed by any of the parties.

[37] In ***Westbank*** at para 29, Gonthier J identified two possible connections between a levy and a regulatory scheme:

> A regulatory charge may exist to defray the expenses of the regulatory scheme, as was the case in ***Allard*** or ***Ontario Home Builders'***, or the regulatory charges themselves may be the means of advancing a regulatory purpose. In [the "Johnnie Walker" case], this Court explained that customs duties were the method of advancing the regulatory purpose of encouraging the importation of certain products, and discouraging the importation of others. Anglin J., at p. 387, explained that customs duties "are, it seems to me, something more" than simple taxation. As with customs duties, other types of charges may proscribe, prohibit, or lend preference to certain conduct with the view of changing individual behavior.

[38] As noted above, this option was reiterated in ***Connaught*** with the Court giving the examples of a charge on landfills to discourage waste production and a deposit-refund on bottles to encourage recycling.

[39] These two potential connections were explored in detail in ***Canadian Broadcasters***, which post-dated ***Connaught***. The Federal Court of Appeal in that case rejected the proposition that only the quantum of revenue and costs was relevant, saying at para 49:

> …the requisite nexus will also exist when the levy has a regulatory purpose. It follows, in my view that where a regulatory purpose for a levy has been established, the requisite nexus between that levy and the regulatory scheme in which it arises will nonetheless exist even if the quantum of the revenues raised by that levy exceeds the costs of the regulatory scheme in which that levy arises.

[40] Accordingly, notwithstanding the discrepancy between the revenue generated by the Mark-up and the cost of administering the scheme arising under the *GLA*, the Mark-up still could be said to be a regulatory charge if it can be shown that the revenues advance the regulatory purpose of the *GLA*.

[41] As noted, however, the AGLC made no submissions in this regard and did not provide evidence in support of such an assertion. I am left with the huge discrepancy between the revenue and the cost of the program. The Court in ***Canadian Broadcasters*** noted at para 76 that the onus is on the Crown to establish this connection:

> In paragraph 28 of his reasons in ***620 Connaught II***, Rothstein J. addresses the onus of proof issue by posing a question: "Has the Government demonstrated that the levy is connected to a regulatory scheme?", thus indicating that the onus rests with the Crown.

[42] The AGLC has not discharged this onus. I cannot conclude that the Mark-up is connected to a regulatory scheme. I find that it is not a regulatory charge.

C. Proprietary Charge

[43] The other possibility is that the Mark-up is a proprietary charge. As noted above, there is some variation in the way in which the courts have referred to this option. Gonthier J in ***Westbank*** called it a "user fee" and characterized it as a "charge for services directly rendered". By contrast, Rothstein J in ***Connaught*** quoted as follows from Professor Hogg in *Constitutional Law of Canada* (5th ed, 2007) at pp 870-71:

> [Proprietary charges] are those levied by a province in the exercise of proprietary rights over its public property. Thus, a province may levy charges in the form of license fees, rents or royalties as the price for the private exploitation of provincially-owned natural resources; and a province may charge for the sales of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way.

[44] The term "proprietary charge" therefore may refer to a charge by a province not only for the use of its property (such as natural resources), but also for the use of its services. I will use the term "proprietary charge" rather than "user fee" in these Reasons.

[45] The AGLC asserts that, pursuant to the *GLA*, it is the sole wholesaler of beer in Alberta. It argues that it plays an active commercial role in the sale of beer and that, like any other proprietor, it is entitled to make a profit, which profit is represented by the Mark-up. The AGLC acknowledges that it no longer acts as a liquor retailer, but asserts that it carries on various functions in respect of liquor supply, including the following activities as summarized from its brief:

- maintains an open listing system to allow manufacturers to list their products for purchase by retailers;
- provides, through an agent, storage and warehousing services for distribution of liquor;
- monitors the agent's performance in distributing liquor;
- collects accounts receivable from liquor licencees relating to distribution services;
- collects purchase price from retailers, pays container deposits, recycling fees, customs and excise duties and GST, and pays the invoice price to manufacturers;
- maintains insurance coverage for certain liquor products; and
- covers the cost to retailers of certain missing or faulty products.

[46] Both Steam Whistle and Great Western take the position that the AGLC has delegated its wholesaling functions to its agent, Connect Logistics Services Inc. ("CLS"). The AGLC

acknowledges that, since privatization, it has contracted with CLS to provide warehousing and logistics services. It is undisputed that CLS levies its own charges, separate from the Mark-up, on manufacturers that use the warehouse. The AGLC argues, however, that it provides oversight of CLS' activities and continues to carry out certain functions not undertaken by CLS, as set out above. The AGLC asserts that it maintains staff members at the CLS warehouse, though the number of those staff members is somewhat unclear.

[47] In addition, as the sole liquor wholesaler in Alberta, the AGLC purchases liquor from manufacturers and sells it to retailers. While the AGLC nominally becomes the owner of the liquor before selling it on to retailers, it does not rely, strictly speaking, on a "proprietary" right, but on the services it provides in its role as wholesaler. In this way, this case is distinguishable from those involving provinces granting rights to publicly-owned natural resources.

[48] Finally, I note that the AGLC has made significant capital investments in the liquor supply chain, including $153 million for a new warehouse in which CLS will operate.

[49] Steam Whistle and Great Western argue that, since the privatization of liquor sales in 1993, the AGLC no longer supplies liquor "in a commercial way" and therefore cannot claim that the Mark-up is a proprietary charge. Both refer to a document published in 1994 by the AGLC's predecessor entitled *A New Era in Liquor Administration: The Alberta Experience*. In its brief, Great Western quotes as follows from that document, which continues to appear on the AGLC's website:

> Prior to the announcement on September 2, 1993, that all liquor retailing would be privatized in Alberta, the ALCB operated a province-wide network of 202 retail liquor stores. To ensure that each store maintained satisfactory on-shelf product levels on both a brand package and size basis, the ALCB maintained inventory valued at $33 million.
>
> The supply chain management function included:
>
> - determining the levels of inventory required in the ALCB warehouse to ensure an adequate supply of product to the ALCB retail network
> - searching out new products for the consumer and removing products not being purchased by the consumer in sufficient quantities to warrant having the ALCB continue to carry them
> - placing orders for products with suppliers
> - arranging for the transportation of product from suppliers to the ALCB warehouse, including consolidation of product orders
> - monitoring shipping times and, where necessary, expediting the shipment of products.

[50] Steam Whistle and Great Western assert that the AGLC no longer performs any of these functions and note a further statement in the *New Era* document that the AGLC "is the

wholesaler in name only, as the other functions of a wholesaler, including supply chain management and product ownership are no longer the responsibility of the [AGLC]".

[51] Great Western also notes as follows in its brief:

> Liquor suppliers (such as Great Western) are solely responsible for transporting their products to the warehouse, at the appropriate times and in the appropriate quantities; liquor suppliers (or their agents) are solely responsible for marketing their products to retailers and other licensees; liquor suppliers engage directly with retailers to determine which products will be sold, in which stores, in which areas of the province, and at what price. The AGLC plays no role whatsoever in the process.
>
> …
>
> The AGLC does not decide when or whether to purchase liquor. Nor does it determine what type of liquor to purchase, in what quantities, from whom, or at what price. Similarly, the AGLC does not determine when or whether to sell liquor, what type of liquor to sell, in what quantities, to whom, or at what price.
> …

[52] Steam Whistle and Great Western effectively assert that the AGLC's post-privatization role in liquor distribution falls below the threshold necessary to constitute a "commercial" operation. The difficulty with that assertion is that no such threshold has been established in the case law.

[53] It is noteworthy, in my view, that the Ontario Court of Appeal in ***Toronto Distillery*** at paras 6 and 7 rejected a narrow interpretation of the phrase "commercial context", as employed by Rothstein J in ***Connaught***:

> The appellant observes that the amount of managerial discretion in commercial contexts falls along a spectrum and advocated interpreting "commercial context" in Rothstein J.'s distinction to require the exercise of active management discretion on a transaction by transaction basis. Such as interpretation is required, he submits, to give meaning to the protection that s. 53 of the *Constitution Act* affords the public from indirect taxation.
>
> We are not persuaded that Rothstein J. intended that "commercial context" be given such a restricted meaning. The application judge found the LCBO was the owner and commercial supplier of the spirits in question. We agree with the application judge's analysis and his conclusion that the mark-up is a proprietary charge and not a tax.

[54] The AGLC relies on three cases in support of its position on the commercial requirement.

[55] In ***Air Canada v Ontario (Liquor Control Board)***, [1997] 2 SCR 581, the issue was the mark-up charged by the LCBO on liquor not purchased in Ontario but held in warehouses at Pearson airport pending its use on international flights. Iacobucci J stated the LCBO's position at para 7:

> The practice of the LCBO has been to charge a "markup" on liquor that is transferred to the domestic area but not on liquor that is transferred to the international area. A markup is a margin of profit that the LCBO adds to the value of the alcohol that it sells. In the case of the alcohol held in bond at Pearson, the LCBO takes its markup not on the basis of any actual sale to the airlines, but on the strength of the [federal *Importation of Intoxicating Liquors Act*], which, in its view, makes it the owner of all alcohol imported into Ontario, and hence entitles it to extract a profit as the price of conveying the liquor back into the airlines' possession.

[56] Iacobucci J held as follows at paras 61 and 62:

> What is more, the physical presence of alcohol in Ontario is of more interest to the province than the appellants allow. It may be true, as they contend, and as Saunders J. accepted, that there is no danger that liquor stored in bond at Pearson will ever "leak" in Ontario and be consumed there. However, the intoxicating qualities of alcohol are not the only ones that interest provincial authorities. The potential income that liquor represents is also of great interest to them. And though it is perhaps true that Parliament did not intend to authorize the provinces to extract revenue without some sufficient foundation for doing so, in this case there is such a foundation: physical presence in Ontario.
>
> …not to permit Ontario to impose some markup on the appellants' liquor would represent a cost to the province – a cost that is equal to the value to the airlines of provisioning their aircraft at Pearson. Because this is a cost that is intimately linked to the fact of presence in Ontario, it cannot be said that the presence of the alcohol in Ontario is merely incidental and of no concern to the province.

[57] In ***DFS Ventures Inc v The Manitoba Liquor Control Commission***, 2001 MBQB 245, aff'd 2003 MBCA 33, the application judge relied on ***Air Canada***, saying at para 61:

> DFS argues that the Supreme Court of Canada did not address specifically the tax issues… That is true. But I find the words of Iacobucci J. persuasive nonetheless, particularly in light of the analysis of Professor Hogg. The markups are proprietary charges and are neither direct nor indirect taxes. If the Supreme Court of Canada had no problem in finding that the LCBO was entitled to make a profit on liquor that it had not supplied, I conclude that it is entirely within the competence of the MLCC to charge a markup on liquor that it sold to DFS.

[58] In ***Toronto Distillery***, a small craft distillery entered into a contract with the LCBO permitting it to retail its product from its own store. The contract required the distillery to sell the product notionally to the LCBO and to pay a specified mark-up. The application judge made these comments at paras 28, 29, 33 and 34:

> …The applicant argues that the only way in which spirits could fall within the definition of proprietary charge is if the LCBO had set up a public tendering system, paying for the spirits itself, physically taking possession of them after purchase, and selling them through its own distribution network.

> I disagree: Professor Hogg's definition specifies that liquor may be subject to such a charge once it is supplied by the province commercially. It is unclear to me how the method of acquisition is relevant when determining whether the province or any of its delegated bodies can impose a charge over merchandise that it owns. The fact that the product remains on the applicant's premises after distillation does not change the fact that the spirits have become the property of the LCBO.
>
> …
>
> The similarities to the case at bar are obvious. The liquor in ***Air Canada*** was not required to physically be in the hands of the LCBO for the court to determine that ownership had passed. As owner of the liquor, it could not be disputed that the LCBO had the right to impose the mark-up.
>
> The second case that supports this conclusion is [***DFS***], where a company challenged the ability of the provincial regulator to impose a mark-up on liquor sold in the duty free store that it owned and operated. Through legislation similar to the case at bar, Manitoba's *Liquor Control Act* specified that DFS could only sell liquor bought from Manitoba's regulatory body, the Manitoba Liquor Control Commission ("MLCC"). Relying on ***Air Canada***, the application judge held that the mark-up was a proprietary charge imposed on liquor owned by the MLCC and sold to DFS for re-sale on its behalf. The Manitoba Court of Appeal upheld the decision concluding that the province's right to force DFS to sell only liquor purchased from the MLCC and to charge a mark-up on that price was constitutionally *intra vires* the Manitoba legislation and consistent with the federal customs regime.

[59] As I have already noted, the Ontario Court of Appeal upheld the application judge and rejected the distillery's argument that a more restrictive definition of "commercial context" was appropriate.

[60] Great Western notes that ***Air Canada*** was not a s. 53 case, but instead concerned the doctrine of interjurisdictional immunity. I note that this argument also was raised before the Court in ***DFS***. While it is true that Iacobucci J was not considering the mark-up in question in the context of s. 53, the case nevertheless makes clear that extensive operations are not necessary to justify the imposition of a mark-up.

[61] Steam Whistle and Great Western distinguish ***DFS*** and ***Toronto Distillery*** on the basis that both the LCBO and the MLCC undertake more extensive operations than does the AGLC. Great Western puts it this way in its brief:

> At first blush, ***DFS*** and ***Toronto Distillery*** appear to be directly on point. However, liquor administration in Alberta is drastically different than either Manitoba or Ontario. Unlike the MLCC or the LCBO, the AGLC has divested itself of all financial responsibility for liquor retailing in Alberta; liquor retailing has been fully privatized.

[62] While there is no dispute that the AGLC no longer operates liquor retailing, it continues to be the sole wholesaler of alcohol in Alberta. The case law holds that even basic wholesale operations are sufficient to constitute a "commercial" operation that will justify a proprietary

charge. I note the above comment from Iacobucci J in ***Air Canada*** that provinces may not extract revenue from liquor without "some sufficient foundation for doing so." In that case, physical presence of the liquor in Ontario was a sufficient foundation. In this case, notwithstanding the AGLC's withdrawal from retailing operations, I find that its remaining role as sole wholesaler in Alberta is a sufficient foundation for a proprietary charge.

[63] I recognize that the *New Era* document states that the AGLC is the liquor wholesaler "in name only". I do not, however, consider this definitive. I am not satisfied that the document provides reliable evidence of the AGLC's current operations. While Ms. Korchinski's testimony was shaken somewhat on cross-examination, her evidence nevertheless indicates that the AGLC carries on operations that are properly characterized as "commercial" under the existing case law. It is apparent to me, having considered all the evidence, that the *New Era* document has been superseded by the subsequent structure and operations of the AGLC.

[64] The AGLC also argued that the Mark-up is not a tax on the grounds that it is paid voluntarily in the context of sales agreements, rather than under compulsion. This argument was accepted by both courts in ***Toronto Distillery***. The courts in that case rejected the argument that the distillery was under a "practical compulsion" because the LCBO would not permit the distillery to operate its store without agreement to the mark-up.

[65] I cannot accept the AGLC's argument in this regard as the facts in ***Toronto Distillery*** were different from those before me. In ***Toronto Distillery***, the applicant was required to enter into the agreement as a condition of selling its product through its own store. Had it chosen not to do so, it had other options, including selling through the LCBO store. In this case, by contrast, the AGLC is the sole wholesaler of alcohol in Alberta. Brewers wishing to sell their beer in this province have no option but to go through the AGLC. I find that there is a greater element of compulsion in this case, and this argument fails.

[66] Taking all of the foregoing into account, I conclude that the Mark-up is, in pith and substance, a proprietary charge, not a tax. In arriving at this conclusion, I am well aware that one of the stated purposes of the Mark-up is to generate revenue. It is clear from the case law, however, that this purpose does not lead inexorably to the characterization of the levy as a tax. Government levies are not limited to defraying the costs of the programs with which they are associated but may, and often do, generate revenue beyond those costs. So long as the levy, properly characterized, falls into one of the other categories, it is not a tax. The Mark-up is therefore valid under s. 53 of the *Constitution*.

[67] I am supported in these findings by the recent case of ***Unfiltered Brewing Incorporated v Nova Scotia Liquor Corporation and the Attorney General of Nova Scotia***, 2018 NSSC 14, in which Mr. Justice McDougall of the Supreme Court of Nova Scotia undertook a similar analysis and arrived at a similar conclusion.

D. Direct or Indirect Tax

[68] In the event that I am wrong in my conclusion that the Mark-up is a proprietary charge and it is found instead to be a tax, I will address the issue of whether it is a direct or an indirect

tax. The AGLC did not address this, but both Steam Whistle and Great Western did. Steam Whistle's position was that the Mark-up is an indirect tax without extensive analysis.

[69] In its brief, Great Western referred to the following definition of direct and indirect taxes as cited by Professor Hogg:

> A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

[70] Great Western also referred to the following statement from the Supreme Court of Canada in ***Canadian Pacific Railway Company v Saskatchewan (Attorney General)***, [1952] 2 SCR 231 at 251-2:

> If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in the course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

[71] I agree with Great Western's position that the Mark-up is this type of charge. It is imposed on beer on a per-litre basis at the wholesaling stage. Though the evidence indicates that the practice of manufacturers is to take the Mark-up into account in setting their wholesale prices with a mind to achieving their desired retail price, I find that the Mark-up is not intended to "rest" with the manufacturers or retailers. Rather, it is intended to form a component of the retail price borne by the ultimate consumer. That being the case, if I am incorrect in concluding that the Mark-up is a proprietary charge, I find that it is an indirect tax. As a result, in accordance with the decision of the Supreme Court of Canada in ***Connaught***, it is *ultra vires* the Alberta Legislature.

III. Section 121

[72] Steam Whistle and Great Western also argue that the Mark-up constitutes a barrier to internal trade in contravention of s. 121 of the *Constitution,* which reads:

> 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

[73] The AGLC argues, in light of the jurisprudence and the evidence of its expert, that s. 121 prohibits only "true" customs duties and tariffs. The applicants agree that s. 121 prohibits tariffs, which their expert describes as charges "that give a price advantage to locally-produced goods over similar goods which are imported." However, the applicants submit that s. 121 also forbids other market distortions and fiscal impediments to trade including "implicit tariffs," which their expert describes as a policy which accomplishes the same revenue-generating objectives as a true tariff, "by raising the price of imported products relative to domestic-produced product [*sic*] but indirectly doing so." The applicants argue that Mark-up is an implicit tariff.

A. Interpretation of Section 121

[74] Until recently, the jurisprudence addressing s. 121 was both limited and somewhat dated. However, with the release of its decision in ***R v Comeau***, 2018 SCC 15, the Supreme Court of Canada has clarified the law and provided specific guidance on the interpretation of s. 121.

[75] In the trial decision in ***Comeau,*** 2016 NBPC 3, LeBlanc PCJ found that, given the limited prior analysis**,** it was appropriate for him to construe s. 121 from scratch. Relying on expert historical evidence, Judge LeBlanc found at para 181 that s. 121 was not intended to be confined to tariff elimination. He held at paras 181-3 that free trade was very politically popular in Britain at the time and that most goods were admitted into Britain without any tariffs. Britain was leading the world in negotiating ambitious free trade deals, and Judge LeBlanc found that the Fathers of Confederation chose to continue this tradition in adopting the British state as their constitutional model. He ruled that s. 121 prevented all barriers to trade between provinces, tariff or non-tariff.

[76] The Supreme Court of Canada held that the trial judge was not justified in departing from the principle of vertical *stare decisis* in this manner and stated at para 37:

> Because the historical evidence accepted by the trial judge is not evidence of changing legislative and social facts or some other fundamental change, it cannot justify departing from vertical *stare decisis*. Differing interpretations of history do not fundamentally shift the parameters of the legal debate in this case. While one's particular collection of historical facts or one's view of that historical evidence may push in favour of a statutory interpretation different from that in a prior decision, the mere existence of that evidence does not permit the judge to depart from binding precedent.

[77] Having determined that the trial judge's approach was unsustainable, the Supreme Court then embarked on its interpretation of s. 121. The Court stated at para 52, "The modern approach to statutory interpretation provides our guide for determining how 'admitted free' should be interpreted. The text of the provision must be read harmoniously with the context and purpose of the statute…". Taking that approach, the Court concluded as follows at para 53:

> Section 121 does not impose absolute free trade across Canada. We further conclude that s. 121 prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but, s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders.

[78] The Supreme Court held at para 89 that the text, historical context, legislative context and underlying constitutional principles "support a flexible, purposive view of s. 121 – one that respects an appropriate balance between federal and provincial powers and allows legislatures room to achieve policy objectives that may have the incidental effect of burdening the passage of goods across provincial boundaries." The Court went on to say at paras 97 and 100:

> These excerpts [from prior cases] reflect many of the themes that emerge in our earlier discussion of historical context, legislative context, and federalism. However, they can be distilled into two related propositions. First, the purpose of s. 121 is to prohibit laws that in essence and purpose restrict or limit the free flow

> of goods across the country. Second, laws that pose only incidental effects on trade as part of broader regulatory schemes not aimed at impeding trade do not have the purpose of restricting interprovincial trade and hence do not violate s. 121. …
>
> Put another way, s. 121 allows schemes that incidentally burden the passage of goods across provincial boundaries, but does not allow them to impose such impediments *only* because they cross a provincial boundary. [Emphasis in original.]

[79] The Supreme Court then set out the process to be followed by a party wishing to challenge a law on the basis of s. 121, holding at para 107 that "…a party alleging that a law violates s. 121 must establish that the law in essence and purpose restricts trade across a provincial border."

[80] With respect to the essence of a law, the Supreme Court made these comments at paras 108 and 109:

> The first question is whether the essence or character of the law is to restrict or prohibit trade across a provincial border, like a tariff. … The claimant must therefore establish that the law imposes an additional cost on goods by virtue of them coming in from outside the province. Put another way, a claimant must establish that the law distinguishes goods in a manner "related to a provincial boundary" that subjects goods from outside the province to additional costs…
>
> The additional cost need not be a charge physically levied at the border, nor must it take the form of an actual surcharge; all that is required is that the law impose a cost burden on goods crossing a provincial border. …

[81] The Court then turned to the second aspect of the test, holding at paras 111 - 113:

> If the law does not in essence restrict the trade of goods across a provincial border, the inquiry is over and s. 121 is not engaged. If it does, the claimant must also establish that the primary purpose of the law is to restrict trade. A law may have more than one purpose. But impeding trade must be its primary purpose to engage s. 121. The inquiry is objective, based on the wording of the law, the legislative context in which it was enacted (i.e. if it is one element of a broader regulatory scheme), and all of the law's discernible effects (which can include much more than its trade-impeding effect). If the purpose of the law aligns with purposes traditionally served by tariffs, such as exploiting the passage of goods across a border solely as a way to collect funds, protecting local industry or punishing another province, this may, depending on other factors, support the contention that the primary purpose of the law is to restrict trade…
>
> Stand-alone laws that have the effect of restricting trade across provincial boundaries will not violate s. 121 if their primary purpose is not to impede trade, but some other purpose. Thus a law that prohibits liquor crossing a provincial boundary for the primary purpose of protecting the health and welfare of the people in the province would not violate s. 121. More commonly, however the primary purpose requirement of s. 121 fails because the law's restriction on trade is merely an incidental effect of its role in a scheme with a different purpose. The

> primary purpose of such a law is not to restrict trade across a provincial boundary, but to achieve the goals of the regulatory scheme.
>
> However, a law that in essence and purpose impedes cross-border trade cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory scheme. If the primary purpose of the broader scheme is to impede trade, or if the impugned law is not connected in a rational way to the scheme's objective, the law will violate s. 121.

B. Application

1. Characterization Test

[82] Pursuant to the Supreme Court's decision in ***Comeau*** on the scope of s. 121, I am to determine the constitutionality of the Mark-up by considering its essence and purpose. While I have considered the 2015 Mark-up and the 2016 Mark-up collectively thus far, it will be useful at this point to conduct the analysis of them separately. However, I note that both Great Western and the AGLC focused their post-***Comeau*** submissions on the 2016 Mark-up and made little mention of the 2015 Mark-up.

2. The 2015 Mark-up

[83] The parties provided a document entitled "Advice to Honourable Joe Ceci, President of Treasury Board and Minister of Finance" and dated October 2, 2015 (the "2015 Briefing Note"). It states that "the government has indicated that it wishes to obtain an additional $85 million in revenue from liquor mark-ups", but also that "the government has indicated that Alberta craft brewers would be part of the government's overall plan to support economic diversification." It provides various proposals to reconcile these two objectives, including increasing mark-ups on craft beer, except for that produced either within Alberta or within Alberta, British Columbia and Saskatchewan, the signatories to the *New West Trade Partnership Agreement.*

[84] The effect of exempting the New West Partnership was to subject craft beer imported from provinces outside it to a higher mark-up rate. New West craft brewers could either lower their prices relative to non-New West craft brewers and capture market share, or maintain prices and make a greater relative profit.

[85] The AGLC argued that the 2015 Mark-up merely removed a benefit that formerly had been available to all Canadian craft brewers, so that the non-New West craft brewers now paid the same mark-up as larger brewers. It asserted that the proper comparison group was not "craft beer" but beer generally, and that the 2015 Mark-up had little discernible impact on the Alberta beer market as a whole.

[86] I agree with Steam Whistle that the craft beer market is a valid comparison group, and that the 2015 Mark-up created a price wedge between imported and domestic products. Accordingly, I find that the essence of the 2015 Mark-up was to create a trade barrier related to a provincial boundary.

[87] The purpose of the 2015 Mark-up was to raise funds, but to do so in such a way as to not prejudice Alberta craft brewers. It was also intended to minimize trade concerns by exempting the New West Partners. Taking this into account, I conclude that the greater charge imposed on craft beer produced outside the New West Partnership was the primary, not incidental, feature of the 2015 Mark-up. As such, the 2015 Mark-up contravened s. 121 of the *Constitution*.

3. The 2016 Mark-up

[88] The 2016 Mark-up effectively has two components: an increased mark-up applied to all craft beer, regardless of origin, and a grant issued to Alberta craft brewers by the Department of Agriculture and Forestry. These grants are based on the volume of beer produced and sold in Alberta and amount to the difference between the amounts payable by Alberta craft brewers under the 2015 and 2016 Mark-ups. As a result, Alberta craft brewers are effectively in the same position as they were in 2015 paying less than the $1.25/L that out of province brewers pay.

[89] The AGLC argues strenuously that the 2016 Mark-up and the grant program must be considered separately. The 2016 Mark-up should be viewed as a universal, unbiased revenue-raising mechanism, while the grant program is a *Constitution*-compliant support for small business.

[90] I agree that grant programs supporting local small business generally do not violate s. 121. These programs usually benefit intra-provincial stakeholders and create trade barriers only incidentally to their primary purpose. I accept that Alberta could provide financial support to craft brewers in a number of ways without creating anything other than an incidental trade barrier.

[91] However, the 2016 Mark-up and the grant program cannot be considered in isolation from one another. The Supreme Court of Canada held in ***Rogers Communications Inc v Chateauguay (City),*** 2016 SCC 23 at para 36 that the purpose of an enactment "is determined by examining both intrinsic evidence, such as the preamble or the general purposes stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted".

[92] There is no doubt that the grant program and the 2016 Mark-up contemplate one another. The policies were announced on the same day in the same press release. The evidence before me included an advice memorandum to the Minister of Finance dated June 8, 2016 (the "2016 Briefing Note"). Its stated purpose is to seek a decision on altering the mark-up structure to mitigate trade concerns while continuing to support Alberta craft brewers. The chosen option was to apply a universal mark-up in conjunction with a corresponding grant program tied to production and sales. A stated "pro" of this option is that "Alberta brewers will receive more of a competitive price advantage in the Alberta market compared to brewers from BC and Saskatchewan."

[93] The evidence also included a letter dated July 11, 2016 from Finance Minister Joe Ceci to the Board of the AGLC in which he requested:

> … that [they] amend Alberta's mark-up rates for beer…to a universal flat rate of $1.25 per litre, regardless of production levels and location of the brewer.
>
> This change will work in concert with an Alberta small brewer-focused grant program…

[94] The Minister specifically acknowledged that the 2016 Mark-up and the grant work "in concert". It is clear that the grant and the 2016 Mark-up are two aspects of the same policy decision and cannot be considered independently. The characterization of the 2016 Mark-up must take into account the grant program.

[95] The purpose of the 2016 Mark-up, in conjunction with the grant program, is to increase revenue while continuing to protect Alberta craft brewers. It subjects all craft brewers to an increased mark-up rate, which, for Alberta craft brewers, is offset by the grant. The practical effect of this is that Alberta craft brewers are not affected by the increased mark-up and therefore have a competitive advantage. Accordingly, viewed with the grant program, the 2016 Mark-up is, in essence and purpose, related to a provincial boundary.

[96] I accept that not all grant programs and supports relate in essence and purpose to a provincial boundary. As the Supreme Court noted in ***Comeau***, provincial governments are entitled under federalism to achieve policy objectives, including supporting local businesses. However, I am also mindful of the Supreme Court's admonition at para 113 that "a law that in essence and purpose impedes cross-border trade cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory scheme."

[97] Taking all of the foregoing into account, the 2016 Mark-up creates a trade barrier that in "essence and purpose" relates to a provincial border. Therefore, it offends s. 121 of the *Constitution*.

IV. Remedy

A. Declaration

[98] The Applicants seek a declaration that the 2015 and 2016 Mark-ups are *ultra vires*.

[99] The AGLC argues that any declaration should be crafted such that it applies only to the unconstitutional aspects of the Mark-up. It proposes, for example, that the exception in the 2015 Mark-up in favour of the New West Partners and the grant program associated with the 2016 Mark-up be declared *ultra vires*, while sparing the remainder of the regimes.

[100] Essentially, what the AGLC asks for is the remedy of severance under s. 52 of the *Constitution*, which is a remedial provision directed at *ultra vires* legislation. Here, there is no legislation challenged. Mark-up rates are set by the AGLC pursuant to s. 80 of the *GLA* at the direction of the Minister of Finance. However, there is no legal reason that I could not grant a restricted, severance-style declaration if appropriate.

[101] ***Schacter v Canada,*** [1992] 2 SCR 679 is the leading case on the doctrine of severance. Lamer CJ ruled at 697 that "[w]here the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion". He went on to cite the test for severance established by the Privy Council in ***Attorney-General for Alberta v Attorney-General for Canada,*** [1947] AC 503 at 518:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

[102] Thus, a court should not assume that the legislature would have passed the rest of a statute without the *ultra vires* provision. In some cases, the court would be interfering with the legislative role more by severing a provision than by striking down the entire statute.

[103] The 2015 and 2016 Mark-ups consist of a scheduled list of rates charged to different categories of liquor products. They are no more than a page or two long. However, declaring them unconstitutional *in toto* would also invalidate the mark-ups applicable to all other products.

[104] On the other hand, there are problems with crafting the declaration too narrowly. The relevant portions of the 2015 Mark-up read:

> Small Brewer Mark-up—Applicable to beer manufactured in the New West Partnership region (Alberta, British Columbia, and Saskatchewan). Each eligible brewer will receive an effective mark-up rate determined by its Annual Worldwide Production (AWP) volume based on a weighted average of the applicable mark-up rates as follows…[$0.10/L to $1.25/L]
>
> …
>
> Standard Beer Mark-up—All beer manufactured outside of the New West Partnership…[$1.25/L].

[105] I could declare that the Small Brewer Mark-up is unconstitutional. This would mean that all craft brewers would be subject to the higher Standard Beer Mark-up. Alternatively, I could restrict the declaration further and hold that only the phrase "Applicable to beer manufactured in the New West Partnership region" is unconstitutional. This would mean that all craft brewers, regardless of origin, should have paid the lower Small Brewer Mark-up. Further complicating matters, the 2015 Briefing Note indicates that different mark-up rates for all other products were considered based on which class of producers the Minister wished to protect while raising the desired target revenue.

[106] Deciding whether Minister Ceci's second choice would have been for all craft brewers to receive a favourable mark-up, for them to all pay the same mark-up as larger brewers, or something in between, is clearly beyond the role of the Court. I therefore declare that the 2015 Mark-up as a whole violates s. 121 by creating a trade barrier related to a provincial boundary.

[107] The 2016 Mark-up presents a similar problem. While I have concluded that the *vires* of the 2016 Mark-up must be considered in connection with the grant program, they were created by executive actions under the authority of different acts. The 2016 Mark-up violates s. 121 only in its contemplated and actual relationship with the grant program. No party has asked me to "read into" the 2016 Mark-up some form of exception for out-of-province craft brewers.

[108] The 2016 Briefing Note as well shows that different mark-up rates for other liquor products and supporting options were contemplated, depending on Minister Ceci's decision as to what category of craft brewers should receive favourable treatment and how. Therefore, I again find it impossible to isolate the objectionable aspect of the 2016 Mark-up.

[109] I therefore declare that the 2016 Mark-up as a whole is *ultra vires* s. 121, in that it is intended to operate simultaneously with the grant program to discriminate between craft brewers and craft beer on the basis of provincial origin, creating a trade barrier relating to a provincial boundary.

B. Restitution

[110] The common law of restitution for money improperly levied by the Crown has a long and convoluted history: see generally, Peter Brinks, "Restitution from the Executive: A Tercentenary

Footnote to the Bill of Rights", in Paul D. Finn, ed., *Essays on Restitution* (Perth, Australia: Law Book Company, 1990) at 164.

[111] In ***Air Canada v British Columbia***, [1989] 1 SCR 1161, La Forest J wrote that restitution should not be available for recovery of unconstitutional or *ultra vires* levies on the public policy grounds that allowing it could lead to financial chaos.

[112] This position was reversed in ***Kingstreet Investments Ltd v New Brunswick (Department of Finance)***, 2007 SCC 1**.** In that case, a user fee was found to be an *ultra vires* indirect tax and the applicant sought restitution. Bastarache J identified the principal issue at para 5 as "whether money paid to a public authority pursuant to *ultra vires* legislation is recoverable".

[113] The Court rejected La Forest J's exception from recovery for improperly levied taxes and held at para 39 that "the ordinary principles of unjust enrichment should not be applied to claims for the recovery of monies paid pursuant to a statute held to be unconstitutional," and that in these cases restitution should be available as a public constitutional remedy, rather than through a private action for unjust enrichment.

[114] The Court concluded that by retaining taxes collected under *ultra vires* legislation the government was undermining the rule of law. It pointed to the *Bill of Rights, 1688*, which guarantees that the executive branch is subject to the rule of law and that there is to be "no taxation without representation". The Court held at paras 14-15 that "To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle".

[115] ***Kingstreet*** leaves two questions unanswered. The first is whether it applies when a tax is *ultra vires* in an administrative sense, that is, when it is imposed by a delegate acting outside of its legislative authority. The second is whether it applies to a non-tax charge levied under an unconstitutional statute. Both these questions are pertinent to the Mark-up. I have found that the Mark-up is not a tax but a proprietary charge. It is imposed by the AGLC pursuant to s. 80(1) of the *GLA*. That provision is not unconstitutional, but by imposing mark-ups which violate s. 121, the AGLC has acted *ultra vires,* in both the administrative and constitutional sense.

[116] None of the parties provided any case law addressing ***Kingstreet*** or whether this restitution claim is better brought under traditional unjust enrichment principles. I must therefore determine whether ***Kingstreet*** should apply.

[117] ***Hislop v Canada (Attorney General),*** 2007 SCC 10 concerned a claim for restitution of benefits withheld under a statute that violated s. 15 of the *Charter.* The majority distinguished ***Kingstreet*** at para 108:

> … The difference between the result in *Kingstreet* and the type of situation in the present case may be understood in terms of a basic distinction between cases involving moneys collected by the government and benefits cases. Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a scheme for benefits falls foul of the s. 15 guarantee of equal benefit under the law, we normally do not know what the legislature would have done had it known that its benefits scheme failed to comply with the *Charter*.

[118] ***Kingstreet*** therefore does not apply to restore benefits improperly withheld.

[119] In ***Sorbara v Canada (Attorney General),*** 2009 ONCA 506, the appellant brought an action for restitution for improper taxation in the Superior Court rather than Tax Court, relying on ***Kingstreet***. The respondent moved for summary judgment on jurisdictional grounds. The Court held at para 5:

> We do not read *Kingstreet* as creating a constitutional cause of action available to a taxpayer whenever he or she claims a right to recover tax assessed under a misapplication or misinterpretation of a taxing statute. Like the motion judge, we do not characterize the appellants' claim as constitutional in nature.

[120] ***Barbour v University of British Columbia,*** 2009 BCSC 425, rev'd on other grounds 2010 BCCA 63, concerned the issuance of parking tickets that were *ultra vires* a statute. Goepel J ruled at para 69 that:

> …[w]hile *Kingstreet* dealt with unconstitutional taxes…[its] reasoning [can] be extended to a public authority such as a university which collects money without legal authority. UBC purported to collect the Parking Regulation Fines pursuant to its powers under the U.A. It now concedes that it has no such power. Having collected the Parking Regulation Fines without any legal authority, those monies, like the taxes in *Kingstreet*, should be returned.

[121] In ***Sivia v British Columbia (Attorney General),*** 2012 BCSC 1030 at para 96, Sigurdson J ruled that ***Kingstreet*** applied only to taxes and not to regulatory charges.

[122] Hogg, Monahan and Wright, in *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 353 write that, "the [***Kingstreet***] right of recovery is available…where taxes were levied without legislative authority in an administrative law sense." They draw this conclusion from paras 54-58 of ***Kingstreet,*** where Bastarache J discarded the doctrines of protest and compulsion in public law restitution actions. He concluded that, "[o]nce the immunity rule is rejected, there is no need to distinguish between cases involving unconstitutional legislation and cases where delegated legislation is merely *ultra vires* in the administrative law sense."

[123] It is clear that the law on this issue is unsettled. I decline to rule on whether ***Kingstreet*** would apply if the Mark-up was *ultra vires* in a purely administrative sense. However, in imposing the Mark-up, the AGLC's actions not only exceeded the jurisdiction conferred on it by the *GLA*, but also violated s. 121. Section 121 operates in a fashion similar to a *Charter* right; it is a constitutional limit on legislative and executive power. No government actor may contravene s. 121, just as it could not contravene a *Charter* right.

[124] The Mark-up is *ultra vires* in the administrative sense, but by imposing it the AGLC also exceeded the boundaries of government action set by the *Constitution*. The Mark-up is unconstitutional and ***Kingstreet*** should apply on that basis.

[125] The tax question is also difficult. ***Kingstreet*** itself concerned a tax and Bastarache J referred both to "money paid" and to taxes. While he pointed to the rule of law as the basis for his ruling, he also cited the principle of "no taxation without representation." At para 15, he concluded that "a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution."

[126] While ***Kingstreet*** concerned an *ultra vires* tax, Bastarache J's use of the broader term "money paid" and reference to the rule of law lead me to the conclusion that ***Kingstreet*** permits restitution when the Crown exacts money in violation of the *Constitution*.

[127] The AGLC also argues that restitution is not available since the Applicants do not pay the Mark-up themselves; it is levied after the beer is acquired by the AGLC and actually is paid by retailers. In response, the Applicants cite ***Pro-Sys Consultants Ltd v Microsoft Corp,*** 2013 SCC 57, which concerned a class of consumers who sought restitution for overpayment. Microsoft resisted certification of the class on the grounds that many of them were "indirect purchasers" who purchased their products through third parties, rather than directly from Microsoft. Rothstein J confirmed the certification, saying at para 50:

> Restitution law is remedial in nature and is concerned with the recovery of gains from wrongdoing... In my view, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge.

[128] In ***Pro-Sys,*** the indirect purchasers were allowed to sue as the middle men had passed on the higher costs to them. In this case, the brewers are the middle men, but the Mark-up is applied further down the line. However, some of the brewers have lowered their wholesale prices to keep the final consumer price down and preserve market share. They, not the retailers, have suffered the loss caused by the increased mark-up. In light of ***Pro-Sys,*** I conclude that restitution is a flexible equitable remedy and that the brewers are entitled to restitution for the deprivation they have suffered as the result of the Mark-up.

[129] Steam Whistle seeks restitution in the amount of $163,964.98, being the amount paid by it under the 2015 Mark-up up to the date of the injunction. I note that, in computing this sum, Steam Whistle subtracted the amount it would have paid under the pre-existing mark-up regime. There is no evidence before me to indicate that, because the 2015 Mark-up was *ultra vires*, the previous mark-up would have remained in force. There is therefore some question as to whether Steam Whistle was obligated to subtract this amount. Nevertheless, I award Steam Whistle $163,964.98 as requested.

[130] Great Western seeks restitution in the amount of $1,938,660.06, being the amount it paid under the 2016 Mark-up between August 5, 2016 and November 9, 2016 when the injunction was granted. This number includes what it would have paid under the 2015 Mark-up. Logically, since the 2015 Mark-up was also *ultra vires*, the amount paid under it should also be repaid, but this was not argued. Great Western also asks for restitution of the amount paid pursuant to the Order of Wilson J, discussed below. This amount arises from that Order, not from the 2015 Mark-up. It is therefore not contingent on the outcome of this litigation and should not be returned. I conclude therefore that Great Western is entitled to $1,938,660.06.

C. Suspension of Declaration

[131] The parties agree that any declaration ought to be suspended to "prevent fiscal chaos" and allow Alberta time to consider its policy options.

[132] As mentioned, this declaration does not strike down a law. It arises from the equitable jurisdiction of the Court and the powers conferred by the *Judicature Act*, RSA 2000, c J-2. Lazar Sarna, in *The Law of Declaratory Judgments* 3d ed, (Toronto: Thomson Carswell, 2007) defines a declaration at page 1 as a "judicial statement confirming or denying a legal right of the applicant". By contrast, an executory, or coercive, remedy can be enforced through contempt

proceedings or civil enforcement: Zamir and Woolf, *The Declaratory Judgment* 3d ed, (London: Sweet & Maxwell, 2000) at para 1.02.

[133] The practice of suspending a declaration has developed primarily in the context of s. 52. However, a declaration is a discretionary remedy and there is no reason a Court could not similarly exercise its discretion to suspend declaratory relief in cases not involving unconstitutional legislation. This Court's power to do so is confirmed in Rule 9.6(b).

[134] La Forest J in ***Air Canada*** noted the potential for "fiscal chaos" that could follow from allowing restitution for unconstitutional taxes. Wilson J, in dissent, strongly disagreed and held at 1215 that there was no reason the loss flowing from an illegal tax should be borne by the innocent individual taxpayer rather than distributed through tax increases in other areas to recoup the restitution claims.

[135] Major J in ***Eurig*** acknowledged La Forest J's concern about fiscal chaos and noted that the unlawful probate fees in that case covered the administration costs of the court. He held at para 44 that "[a]n immediate deprivation of this source of revenue would likely have harmful consequences for the administration of justice in the province", and suspended the declaration of invalidity for six months.

[136] In ***Kingstreet,*** Bastarache J also noted La Forest J's concern but held at paras 12 and 25:

> The Court's central concern must be to ensure the constitutionality of fiscal legislation. Moreover, the availability of suspended declarations of invalidity as ordered in [***Eurig***] and the possibility of retroactive ameliorating legislation are sufficient to guard against the possibility of fiscal chaos.
>
> …
>
> My view is that concerns regarding potential fiscal chaos are best left to Parliament and the legislatures to address, should they choose to do so. Where the state leads evidence before the court establishing a real concern about fiscal chaos, it is open to the court to suspend the declaration of invalidity to enable government to address the issue…

[137] The Mark-up regime constitutes a very large source of income for Alberta. It would be disruptive to deprive the Province of this source of revenue through an immediate declaration, particularly when I have found that only the two most recent versions of the regime are problematic. I note, however, that the mark-up rates are set at the discretion of the Minister and the AGLC. This is not a case where time must be given for legislative process and debate. On the other hand, I acknowledge that Alberta may choose to enact some form of retroactive legislation to defray any additional liability in restitution. I therefore follow the example of ***Eurig*** and suspend the declaration made above for six months from the date of publication of this judgment.

D. Effect of Suspension of Declaration on Restitution

[138] This, however, is not the end of the matter. I must decide whether the suspension of the declaration affects the availability of restitution. I am concerned that to suspend the declaration while granting restitution to these Applicants create the impression of "palm tree justice" against which the Supreme Court warned in ***Kingstreet*** (para 38).

[139] In ***R v Demers,*** 2004 SCC 46 at paras 99-101, LeBel J, in dissent, explained the difference between public and private litigation in the context of considering a constitutional exemption:

> Public law litigation is essentially different from private law. In private law actions, remedies are primarily geared towards compensating a plaintiff for the loss suffered at the hands of a defendant. By contrast, public law actions are about ensuring compliance with the Constitution, in this case, vindicating constitutional rights that have been violated by the State. In doing so, it is typically more than an individual claimant's rights that are being affirmed; the benefit of a successful claim enures to society at large. For when an individual or group successfully obtains a remedy for illegal state action, the constitutional rights and freedoms of all citizens are enhanced…
>
> …
>
> And, most significantly, the effects of a judgment in a public law case reach far beyond the party bringing the claim against the State. The primary focus is often on achieving future compliance with the Constitution, rather than compensating past wrongs.
>
> Nevertheless, public law actions share a necessary commonality with private litigation: an individual or group is seeking to redress a wrong done to them. The larger public dimensions of a constitutional challenge piggyback on the claimant's pursuit of his or her own interests, particularly in criminal law cases. Courts should not lose sight of this symbiosis; they should not forget to provide a remedy to the party who brought the challenge. This is not a reward so much as a vindication of the particularized claim brought by this person in assertion of his or her rights. Corrective justice suggests that the successful applicant has a right to a remedy…

[140] This case has attributes of both public and private law. The declaration requested is in the nature of a public law remedy. It is intended to secure future AGLC compliance with the *Constitution* and will create a precedent upon which other litigants will rely. Restitution, while usually a private law remedy, also should be seen as having a public law aspect when ordered pursuant to ***Kingstreet.***

[141] In my view, it would not be inconsistent to simultaneously suspend the declaration and order restitution. I have declared that the Mark-up is *ultra vires,* but exercised my discretion to suspend the declaration. This does not affect the underlying finding that supports restitution. I note that the Supreme Court in ***Eurig*** ordered restitution alongside a suspended declaration.

[142] While it may be legally correct to suspend the declaration but not the restitution order, the effect of this may be to nullify the declaration. ***Kingstreet*** restitution is a public law remedy. It is not an equitable remedy in the sense that it does not depend on the specifics of the parties. When the government exacts money without authority, restitution follows as a matter of public law. I therefore see no reason why any other party in the position of the Applicants would not be entitled immediately to the same remedy if the restitution order is not suspended. Obviously, this would undermine the rationale behind suspending the declaration. Therefore, I also suspend the restitution order for the same period of time.

V. Injunction

[143] On January 18, 2016, Wilson J granted an interim injunction in favour of Steam Whistle preventing the application of the 2015 Mark-up. Instead, Steam Whistle was to continue to pay $0.51/L, the rate it paid prior to the 2015 Mark-up. On November 8, 2016, both Applicants received a further injunction from Wilson J preventing the application of the 2016 Mark-up. Great Western would instead pay $0.48/L, the price it paid under the 2015 Mark-up.

[144] These injunctions are in force "pending the determination" of this matter. The Applicants ask for an extension until the expiration of the six month declaration suspension. I grant this extension on the same terms as set by Wilson J.

VI. Conclusion

[145] In summary, I declare that the 2015 and 2016 Mark-ups contravene s. 121 of the *Constitution.* Steam Whistle is entitled to restitution of $163,964.98. Great Western is entitled to restitution of $1,938,660.06. I suspend the declaration and the restitution orders for a period of six months from the date of this judgment. In the meantime, the injunctions ordered by Wilson J continue in effect on the same terms.

[146] The applicants have been successful and are entitled to costs.

Heard on June 22nd, 23rd, September 19th, 20th, 2017 and June 1st, 2018.
Dated at the City of Calgary, Alberta this 19th day of June, 2018.

Gillian D. Marriott
J.C.Q.B.A.

Appearances:

Andrew E. Stead and Preet Saini
for Steam Whistle Brewing Inc.

Douglas C. Hodson, Q.C. and Kristen MacDonald
for Great Western Brewing Company Ltd.

Sean P. McDonough and Robert J. Normey
for Her Majesty the Queen In Right of Alberta and the Alberta Gaming and Liquor Commission